

**BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA**

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**IN THE MATTER OF APPLICATIONS TO  
CHANGE WATER RIGHT NO. 41H-30004451 )  
BY CONSTANCE COWETT; NO. 41H- )  
2356200 BY CHARLES AND AMELIA KELLY; )  
NO. 41H-30018777 BY DAVID AND CORA )  
RALL )**

**FINAL ORDER**

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Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by MCA § 85-2-307, a hearing was held on July 26 – 27, 2007 in Bozeman, Montana to determine whether the subject Applications to Change a Water Right (Application No. 41H-30004451 hereinafter referred to as “Cowett”; Application No. 41H-2356200 hereinafter referred to as “Kelly”; and Application No. 41H-30018777 hereinafter referred to as “Rall”) should be approved under the criteria set forth in MCA § 85-2-402.

**BACKGROUND**

The history of these applications and the underlying water rights is truly a long and dusty road. Initially, the DNRC received an “Application for Change of Appropriation Water Right” submitted by David and Cora Rall on June 16, 1995 (Application No. 41H-023557). The underlying water rights for Application No. 41H-023557 were listed as Statement of Claim Nos. 41H-023560, 41H-023561, 41H-023557, 41H-023559-00, 41H-046136, and 41H-101024. This change application was objected to by Mark and Constance Cowett, Frank and Clarice Dreyer, Charles and Amelia Kelly, Archibald Alexander, Ken Walker, and John Brown (Ken Walker’s objection was deemed “incorrect” or “incomplete” and John Brown’s objection was deemed untimely). Through the course of processing Application No. 41H-023557 some of the Statements of Claim were withdrawn and a number of objectors petitioned the DNRC to certify the remaining Statements of Claim to the District Court pursuant to MCA § 85-2-309. Eventually, on November 1, 1996, the DNRC certified to the District Court Statement of Claim Nos. 041H-023559, 41H-023561, 41H-046136, and 41H-010124 (sic) to rule on “the validity, periods of use, points of diversion, and flow rates” of those claims. The District Court transferred the case to the Water Court which assigned it case number WC-96-2. Statement of

Claim No. 41H-046136 was one of the Statements of Claim which was withdrawn from the change application prior to certification so the Water Court dropped that claim from Case No. WC-96-2. Subsequent to the transfer the Water Court granted the consolidation of other related claims (which are not pertinent to the instant change applications) into the Case No. WC-96-2 proceedings. On October 31, 2001 the Water Court filed a "Memorandum Opinion" in Case No. WC-96-2. After receiving a Motion and Brief to Amend the Memorandum Opinion and after further proceedings, the Water Court filed an "Order Modifying Memorandum Opinion" on November 7, 2002. Finally, the Water Court filed its "Order Remanding Claims to The Department of Natural Resources and Conservation and Closing Order" on December 13, 2002. In that Order the Water Court ordered "that this matter is **REMANDED** to the [DNRC] for the further processing of the change of appropriation application filed by David A. Rall and Cora R. Rall."

Water Court Case No. WS-96-2 involved water right claims from Middle Cottonwood Creek located on the west side of the Bridger Mountains in Gallatin County. Middle Cottonwood Creek was decreed in Huffman v. Arnold, Case No. 6757 (Montana Ninth Judicial District, 1922). The 1922 decree awarded 150 miner's inches of water from North Cottonwood Creek, (now known as Middle Cottonwood Creek) to Martin V. Huffman, Jonathan Walker, and James Walker. This decreed water carries a priority date of May 15, 1871. Martin V. Huffman, Jonathan Walker, and James Walker were each decreed an equal share of the 150 inch 1871 water right and an undivided 1/3 interest in the Davis Ditch. During the intervening years between 1922 and Water Court Case No. WC-96-2, the lands and water rights at issue were broken up and sold or otherwise transferred. The current claimants are the successors in interest to some of the original lands and water rights.

After the dust settled from the Water Court proceedings, by Memorandum Opinion (Case No. WC-96-2) ("MO") dated October 31, 2001 and Order Modifying Memorandum Opinion (Case No. WC-96-2) ("OMMO"), on November 7, 2002, the following water rights were established:

<b>Jonathan Walker</b> 41H-W-003785-00	<b>5/15/1871</b> Ken Walker	<b>50 miner's inches</b> 50 inches irrigation
<b>Martin V. Huffman</b> 41H-W-023559-00 41H-W-023561-00	<b>5/15/1871</b> D & C Rall D & C Rall	<b>50 miner's inches</b> 20.00" irrigation multiple use with <u>20.00"</u> stockwater as a multiple use 20.00" Subtotal for Rall
41H-W-023562-00 41H-W-033079-00	C & A Kelly C & A Kelly	5.00" domestic 18.75" stockwater

41H-w-018909-00	J & P Brown	<u>3.125"</u> stockwater
		26.875" Subtotal for Kellys & Brown

Total miner's inches for Martin V. Huffman right: 46.875

<b>James Walker</b>	<b>5/15/1871</b>	<b>50 miner's inches</b>
41H-W-101024-01	Dreyer/Kelly	5.00" domestic multiple use with
41H-W-115513-01	Dreyer/Kelly	<u>5.00"</u> stockwater as a multiple use
		5.00" Subtotal for Dreyer/Kelly

41H-W-101024-00	C. K. Cowett	22.50" domestic multiple use with
41H-W-30002021	C. K. Cowett	<u>22.50"</u> stockwater as a multiple use
		22.50" Subtotal for Cowett

41H-W-30002020	D & C Rall	22.50" irrigation multiple use with
41H-W-115513-00	D & C Rall	<u>22.50"</u> stockwater as a multiple use
		22.50" Subtotal for Rall

Total miner's inches for James Walker right: 50.00

<b>Use Claims</b>	<b>5/1/1871</b>	<b>100 miner's inches</b>
41H-W-023557-00	D & C Rall	0.00 TERMINATED
41H-W-023560-00	D & C Rall	<u>0.00</u> TERMINATED

Total miner's inches for use claims: 0.00

The Water Court further declared in regard to Claim No. 41H-W-033079-00 (Kelly) "[b]ecause . . . sold the 18.75 miner's inches to Kellys . . . but did not sell them the claimed place of use . . . Kelly's must pursue an application to change the place of use with the DNRC." A similar statement appears in the Order regarding Claim No. 23559-00 and 23561-00 applying to the Ralls. Cowett also finds herself similarly situated owning a water right that lists a place of use on property not owned by her.

For reasons not apparent in the record, Application No. 41H-23557 was apparently terminated by the Department on December 9, 2005. In accordance with the Water Court's decision, Cowett, the Kelly's and the Rall's now have change applications (41H-30004451, 41H-2356200 and 41H-30018777, respectively) before the Department.

### **APPEARANCES**

Applicant Cowett appeared at the hearing by and through counsel Suzanne Nellen. Scott Compton and Mark Cowett were called and testified for Cowett. Objector Kelly called Amelia Kelly and Steve Kelley in opposition to the Cowett application. Objector Kelly/Dreyer called Jan Mack in opposition to the Cowett application.

Applicant Kelly appeared at the hearing by and through counsel Holly Franz. Amelia Kelly was called and testified for Kelly. Objector Rall called Karl Uhlig in opposition to the Kelly application.

Applicant Rall appeared at the hearing by and through counsel Michael Cusick. David Rall, Karl Uhlig, Dan Hoffman, Don Wahl Sr., and Scott Compton were called and testified for Rall. Objector Kelly called Scott Compton, Jan Mack, Steve Kelly and Amelia Kelly in opposition to the Rall application.

Objector Kelly/Dryer appeared at the hearing through Steve Kelly as an objector to all three applications.

### **EXHIBITS**

Cowett offered the following which were admitted into the record:

**Exhibit C-1:** Warranty Deed conveying property and water rights from Paul and Kathryn Jordan to Constance Cowett dated October 18, 1988.

**Exhibit C-2:** Plat indicating the location of the Cowett Property in Sec. 8 and 17 T1S, R6E with the place of use for water rights 101024 and 30002021 penciled in at the hearing.

**Exhibit C-3:** General Abstract of Statement of Claim No. 41H-101024.

**Exhibit C-4:** General Abstract for Statement of Claim No. 41H-30002021.

Kelly offered the following which were admitted into the record:

**Exhibit K-1:** A large aerial photograph reproduction showing the Middle Cottonwood Creek area involved in these change applications dated September 9, 2001.

**Exhibit K-2:** A hand drawn showing the general features of the Rall pond and infrastructure including the Davis ditch system.

**Exhibit K-3:** A one page memorandum from Jan Mack to "Application To Change A Water Right # 2355799-41H" dated November 18, 2005.

**Exhibit K-4:** A copy of a letter from Jan Mack to William Russell McElyea regarding Permit to Appropriate Water #85013-S41H dated March 14, 1996.

**Exhibit K-5:** General Abstract for Ground Water Certificate 41H-30006666.

**Exhibit K-6:** A copy of a Water Use Complaint filed by Kelly/Dryer against Rall dated August 18, 2006 along with 2 call letters from Kelly/Dryer to Rall dated August 16 and August 24, 2006.

**Exhibit K-7:** Water Commissioner records for Middle Cottonwood Creek for the years 2003, 2004 and 2005.

**Exhibit K-8:** A copy of a Laboratory Analytic Report for a water sample taken from the "POD Davis Ditch" collected on June 14, 2007.

**Exhibit K-9:** A copy of a Laboratory Analytic Report for a water sample taken from "Tank Rall Pond Return Flow" collected on June 14, 2007.

**Exhibit K-10:** A copy of a Laboratory Analytic Report for a water sample taken from "Rall Pond Return Flow" collected on June 14, 2007.

**Exhibit K-11:** A copy of "Energy Laboratories Inc. Workorder Receipt Checklist" dated June 15, 2007.

**Exhibit K-13:** Two photographs dated June 14, 2007 showing the "Rall Pond Return Flow Tank" and "Bottles # 1 POD Davis Ditch, #2 Rall Pond Return Flow #3 Rall Pond Return Flow Tank."

**Exhibit K-14:** Two untitled photographs showing the Davis Ditch and the Davis Ditch diversion structure dated June 14, 2007.

**Exhibit K-15:** Two untitled photographs showing the vicinity of the Rall Pond return flow dated June 14, 2007.

**Exhibit K-16:** Two photographs titled "Rall Pond Return Flow Tank Looking North & Algae" and "Davis Ditch Algae Growth alongside Below Rall Pond – Pond Diversion No Algae Growth Above Rall Pond Diversion" dated June 14, 2007.

**Exhibit K-17:** Two untitled photographs and one photograph titled "Kelly Pond" dated June 3, 2007.

**Exhibit K-18:** Six untitled photographs appearing to show overflow icing dated January 31, 2007.

**Exhibit K-19:** Three untitled and undated photographs appearing to show a portion of the Davis Ditch.

Rall offered the following which were admitted into the record:

**Exhibit R-1:** A copy of a Quit Claim Deed from Cora Rall to Saddle Mountain LLC conveying certain property in Gallatin County, Montana dated July 2, 2003; A copy of a Quit Claim Deed from Cora and David Rall to Saddle Mountain LLC conveying certain property in Gallatin County, Montana dated August 11, 2003; A copy of a Warranty Deed from Paul and Kathryn Jordan to David and Cora Rall conveying certain property in Gallatin County, Montana including water rights dated December 3, 1990; A copy of a Warranty Deed from Paul and Kathryn Jordan to David and Cora Rall conveying certain property in Gallatin County, Montana dated December 12, 1990.

**Exhibit R-2:** A copy of an aerial photograph of the Middle Cottonwood Creek and Davis Ditch area indicating landownership and the Davis Ditch system dated 2006.

**Exhibit R-3:** General Abstracts for Statement of Claim 41H-23559-00, Statement of Claim 41H-23561-00, and Statement of Claim 41H-30002020.

**Exhibit R-6:** A summary of the water rights as determined by the Water Court in Case WC-96-2.

**Exhibit R-7:** General Abstract for Provisional Permit 41H-85013.

**Exhibit R-8:** An enlarged portion of Exhibit R-2 showing the Rall property and details of the Rall Pond system.

**Exhibit R-9:** General Abstract for Ground Water Certificate 41H-30026435.

**Exhibit R-10:** A two page invoice from Wahl's Custom Excavating to David Rall for work on the Rall Pond dated August 24, 2005.

**Exhibit R-11:** A copy of a Private Pond Fish Stocking license from Montana Fish, Wildlife and Parks to David Rall dated September 19, 2006.

**Exhibit R-12:** A copy of an invoice from Nelson Spring Creek (apparently a fish hatchery) to David Rall (date unreadable).

**Exhibit RC-1 – RC-3:** Three photographs (undated) showing the inlet system to the Rall Pond, the Rall Pond electronic system, and the Rall Pond outlet structure.

**Exhibit RW-1 – RW-22:** Twenty-two photographs (undated) showing construction of the Rall Pond.

**Exhibit RU-1 – RU-22:** Twenty-one photographs showing the Davis Ditch diversion from Middle Cottonwood Creek, the main headgate, the splitter box, the Rall Pond, and other features of Davis Ditch with an index and description of each photograph with dates.

**Exhibit RU-23:** A copy of a Montana Well Log Report for a well owned by David Rall dated September 25, 2002.

**Exhibit RH-1:** A copy of "Davis Ditch Water Temperature and Water Quality Investigations" prepared for David Rall by PBS&J dated January 9, 2007.

**Exhibit RO-1:** A copy of a Warranty Deed from Martin Walker to William and Cheryl Roller conveying certain property and water rights in Gallatin County, Montana dated June 19, 1986.

**Exhibit RO-2:** Appears to be a duplicate of Exhibit RO-1.

**Exhibit RO-3:** A copy of a Warranty Deed from William and Cheryl Roller to Charles and Amelia Kelly conveying certain property in Gallatin County, Montana dated April 8, 1991.

**Exhibit RK-1:** Appears to be a duplicate of Exhibit RO-3.

**Exhibit RK-2:** Appears to be a duplicate of Exhibit RO-1.

The Hearing Examiner, at hearing and without objection, took administrative notice of the Memorandum Opinion (Case No. WC-96-2) ("MO") dated October 31, 2001 and Order Modifying Memorandum Opinion (Case No. WC-96-2) ("OMMO") along with the "Partial Transcript of Proceedings (The testimony of Edwin Walker and Paul Jordan) in Case No. WC-96-2 ("Walker/Jordan testimony"). ARM 36.12.221.

**APPLICATION NO. 30004451 (COWETT)**

**Findings of Fact**

**General**

1. Application to Change Water Right No. 41H-30004451 in the name of Constance K. Cowett was filed with the Department on November 20, 2002. (Department File)
2. The application proposed to change the place of use of Statement of Claim No. 41H-101024-00 from the NWSWSW Section 8, T1S, R6E (Kelly/Dryer Property) to the S2S2SW Sec. 8 and the N2NWNW Sec. 17, T1S, R6E (Cowett Property) and Statement of Claim No. 41H-30002021 from S2NWSE Sec. 8, T1S, R6E (Rall Property) to the Cowett Property. The application also proposed to change the purpose of use to waterfowl and wildlife utilizing a new pond with a storage capacity of 0.15 acre feet. (Department File)
3. The Environmental Assessment (EA) prepared by the Department for this Change Application was reviewed and is included in the record of this proceeding. The EA concludes that there will be no significant impact on the environment if the change is approved. (Department File)
4. A public notice describing the facts pertinent to this Change Application was published in the *Bozeman Daily Chronicle*, a newspaper of general circulation, printed and published in Bozeman, Montana, on September 8, 2004 and was mailed to persons listed in the Department file on September 3, 2004. (Department File)
5. As a result of the Water Court decision in Case No. WC-96-2 the Applicant finds themselves the owners of 22.5 miner's inches (252.45 gpm) of the James Walker decreed water right with a priority date of May 15, 1871. Those 22.5 miner's inches are reflected in Statement of Claim Nos. 41H-101024-00 and 41H-30002021. Statement of Claim No. 41H-101024-00 is a domestic use claim with a period of use from May 1 to September 30. The Water Court established in the OMMO a of volume of 7.00 acre feet for this claim appurtenant to 2.45 acres in the NWSWSW Sec. 8, T1S, R6E. Statement of Claim No. 41H-30002021 is a stock claim with a period of use from January 1 to

December 31. The Water Court did not establish a volume for this claim but stated “THIS WATER RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCKWATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.” The Water Court found that Statement of Claim No. 41H-30002021 was appurtenant to the S2NWSE Sec. 8, T1S, R6E. These two Statements of Claim are for the same 22.5 miner’s inches of water and thus are multiple use claims. In other words, the use of these claims for several purposes does not increase the extent of the right(s) but rather allows the owner to alternate and exchange the use of the water. (OMMO)

6. Objections to the Application were received by the Department from Charles and Amelia Kelly (Kelly), David and Cora Rall (Rall), and Clarice Dreyer and Steve Kelly (Department File)
7. On July 12, 2007, Cowett filed with the Department “Withdrawal of Portion of Application Regarding Pond.” With the withdrawal of the pond portion of the Application there is no change in the purpose of use only a change in the place of use. (Department File)
8. At hearing Objector Rall withdrew their objection to Application No. 41H-30004451. (Hearing Record)

### **Historic Use**

9. Water right Statement of Claim Nos. 41H-101024-00 (Cowett) and 41H-101024-01 (Kelly/Dryer) are both adjudicated claims for domestic use (as a multiple use) on the same 2.45 acres of land currently owned by Kelly/Dryer. These two claims both list a specified volume of 7 acre feet. In addition, Statement of Claim No. 41H-30002020 (Rall) is an adjudicated claim for irrigation use (as a multiple use) on the same 2.45 acres of land but does not list a specified volume. (OMMO, pp. 8)
10. The original James Walker 50 miner’s inch right was used historically and in similar fashion, along with the Jonathan Walker and Martin v. Huffman 50 miner’s inch rights, at all three original homesteads. Both Edwin Walker and Ken Walker testified in Water Court Case No. WC-96-2 that water was used to irrigate lawns, gardens and orchards around the homesteads. (MO at ¶¶ 8 – 12)
11. Of the 150 miner’s inches originally decreed (Jonathan Walker, Martin V. Huffman, James Walker) there was, in most years, less than 150 miner’s inches available and the



- water that was available was split between the three homesteads for the limited purposes of watering stock, and irrigating lawns, gardens and orchards. (MO at ¶ 10)
12. There is no evidence in the record of the *actual* amounts of water diverted or used for domestic or irrigation purposes under Statement of Claim Nos. 41H-101024-00, 41H-101024-01 or 41H-30002020. Nor was there any evidence of how these three rights were used historically so as to be able to understand the historic use of each right. (Department File, Hearing Record)
13. Water right Statement of Claim Nos. 41H-30002021 (Cowett), 41H-115513-00 (Rall), and 41H-115513-01 (Kelly/Dryer) are all claims for stock watering purposes (as a multiple use) based on the James Walker right. The location of the Cowett claim overlaps a portion of the Rall claim while the location of the Kelly/Dryer claim is separate. None of these claims specify a volume of water other than the statement “THIS WATER RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCKWATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON THE REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.” (Abstract of Claim Nos. 41H-115513-00, 41H-115513-01, 41H-30002021)
14. There is nothing in the record to document the *actual* historic use of these water rights nor is there any indication of the reasonable carrying capacity of the lands to which claims 41H-115513-00, 41H-115513-01, or 41H-30002021 are appurtenant. The only evidence of stock water use was presented through the testimony of Edwin Walker and Ken Walker who testified in Water Court Case No. WC-96-2 that water was used year-round for stock watering but they provided no testimony on the actual amounts of water used for stock. (MO at ¶ 8-12)

#### **Adverse Effect**

15. Application No. 41H-30004451 does not identify the water rights which may be affected by the changes proposed (other than the rights of objectors to the Application). The Department does, however, identify the water rights on Middle Cottonwood Creek in the public notice portion of the Department’s file. (Department file)
16. Applicant has not analyzed the effects of this change application on the use of the existing water rights of other persons on the source. (Department file)
17. While it is clear that water was historically diverted under these water rights, no quantification of the historically diverted flow or volume of each right was presented. In

fact, when Edwin Walker was asked “[h]ow did you know how much water was diverted at the main diversion up on the creek?” his reply was “We didn’t.” While all of the water diverted would be from the historically used point of diversion, there is no evaluation of how changing the places of use would affect return flows and potential downstream users. (Walker/Jordan testimony @ 51:21; Department file).

### **Means of Diversion**

18. Applicant proposes to utilize the existing ditch system which flows through the lands involved. This ditch system has been in place for many years and is adequate for the proposed uses. (Department file, testimony of Scott Compton, Exhibit R-2, Exhibits RU-1 through RU-22).

### **Beneficial Use**

19. Applicant proposes to use water for stock and domestic purposes. These two uses are identified beneficial uses under MCA 85-2-102. Applicant estimates that they will have 20 to 25 animal units for under the stock watering portion of the application and 2.45 acres of lawn and garden under the domestic portion of the application. The 2.45 acre lawn and garden use falls within the Department’s guidelines for a domestic use. No historic volumes used under these rights or estimated volumes for the proposed use are in the record. Nor is there any evidence submitted as to the flow rate necessary to sustain each beneficial use, operating separately or together. (Department file, testimony of Mark Cowett)

### **Possessory Interest**

20. The Applicant has a possessory interest in the property where the water is to be put to beneficial use. (Department file, Exhibits C-1, C-2)

### **Water Quality**

21. The application received one water quality objection. This objection appears to be premised on the original application by Cowett which included a pond. As stated in Finding of Fact No. 7, the pond portion of the application was withdrawn. The Hearing Examiner finds that withdrawal of the pond portion of the application moots the water quality objection. As such, no further findings or conclusion regarding water quality under this application will be considered. (Department file, Finding of Fact No. 7)

Based on the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

## **Conclusions of Law**

### **General**

1. The Department has jurisdiction to approve a change in appropriation right if the appropriator proves the criteria in MCA § 85-2-402.
2. The Department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued; except for a lease authorization pursuant to MCA § 85-2-436, a temporary change authorization for instream use to benefit the fishery resource pursuant to MCA § 85-2-408, or water use pursuant to MCA § 85-2-439 when authorization does not require appropriation works, the proposed means of diversion, construction and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; except for a lease authorization pursuant to MCA § 85-2-436 or a temporary change authorization pursuant to MCA § 85-2-408 or MCA § 85-2-439 for instream flow to benefit the fishery resource, the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use; if the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant; and, if raised in a valid objection, the water quality of a prior appropriator will not be adversely affected; and the ability of a discharge permit holder to satisfy effluent limitations of a permit will not be adversely affected. MCA §§ 85-2-402(2)(a) through (g).
3. A public notice containing the facts pertinent to the change application must be published once in a newspaper of general circulation in the area of the source and mailed to certain individuals and entities. This requirement has been met MCA § 85-2-307. (Finding of Fact No. 4)

### **Adverse Effect**

4. In an application for a change in a water right, there must be some evidence of the actual historic use made of the water right.

The applicant in a change proceeding in Montana must prove the historic beneficial use of the water to be changed, no matter how recently the water right was decreed in Montana's adjudication. The DNRC in administrative rulings has held that a water right in a change proceeding is defined by actual beneficial use, not the amount claimed or even decreed. In the Matter of Application for Change

Authorization No. G(W)028708-41I by Hedrich/Straugh/Ringer, Final Order, (1991); In the Matter of Application for Change Authorization No. G(W)008323-g76L by Starkel/Koester, Final Order, (1992). Although since Montana started its general statewide adjudication there is no Montana Supreme Court case on point to support the conclusion that even water rights as decreed in final decrees will be limited in change proceedings to their historical use, that conclusion is supported by the case of McDonald v. State, , 220 Mont. 519, 722 P.2d 598 (1986). As a point of clarification, a claim filed for an existing water right in accordance with MCA § 85-2-221 constitutes *prima facie* proof of the claim for the purposes of the adjudication pursuant to Title 85, Chapter 2, Part 2. The claim does not constitute *prima facie* evidence of historical use for the purposes of a change in appropriation proceeding before the Department under MCA § 85-2-402.

*In the Matter of Application No. 76H-30009407 to Change Water Right Nos. 76H-108722 and 76H-108773 by North Corporation - Final Decision.*

In a change proceeding, it must be emphasized that other appropriators have a vested right to have the stream conditions maintained substantially as they existed at the time of their appropriations. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727 (1908); Robert E. Beck, 2 Waters and Water Rights § 14.04(c)(1) (1991 edition); W. Hutchins, Selected Problems in the Law of Water Rights in the West 378 (1942). Montana's change statute reads in part:

85-2-402. (2) ... the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) *The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.*

....

(13) A change in appropriation right contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized change in appropriation right. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section

(italics added).

Montana's change statute simply codifies western water law.<sup>1</sup> One commentator describes the general requirements in change proceedings as follows:

Perhaps the most common issue in a reallocation [change] dispute is whether other appropriators will be injured because of an increase in the consumptive use of water. Consumptive use has been defined as "diversions less returns, the difference being the amount of water physically removed (depleted) from the stream through evapotranspiration by irrigated crops or consumed by industrial processes, manufacturing, power generation or municipal use." "Irrigation consumptive use is the amount of consumptive use supplied by irrigation water applied in addition to the natural precipitation which is effectively available to the plant."

An appropriator may not increase, through reallocation [change] or otherwise, the actual historic consumptive use of water to the injury of other appropriators. In general, any act that increases the quantity of water taken from and not returned to the source of supply constitutes an increase in historic consumptive use. As a limitation on the right of reallocation, historic consumptive use is an application of the principle that appropriators have a vested right to the continuation of stream conditions as they existed at the time of their initial appropriation.

Historic consumptive use varies greatly with the circumstances of use.

Robert E. Beck, 2 Water and Water Rights at § 14.04(c)(1)(b), pp. 14-50, 51 (1991 edition).

In Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955 (Colo. 1986), the court held:

[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of *requantification of the water right based on actual historical consumptive use*. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right.

(italics added).

See also 1 Wells A. Hutchins, Water Rights and Laws in the Nineteen Western States, at 624 (1971)(changes in exercise of appropriative rights do not contemplate or countenance any increase in the quantity of water diverted under the original exercise of the right; in no event would an increase in the appropriated water supply

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1. Although Montana has not codified the law in the detail Wyoming has, the two states requirements are virtually the same. Wyo. Stat. § 41-3-104 states:

2. When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change .... The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used

be authorized by virtue of a change in point of diversion, place of use, or purpose of use of water); A. Dan Tarlock, Law of Water Rights and Water Resources, at § 5:78 (2007)(“A water holder can only transfer the amount that he has historically put to beneficial use.... A water holder may only transfer the amount of water consumed. The increment diverted but not consumed must be left in the stream to protect junior appropriators. Consumption is a function of the evapotranspiration of the appropriator’s crops. Carriage losses are usually added to the amount consumed by the crops.”); Colo. Rev. Stat. § 37-92-301(5)(in proceedings for a reallocation [change], it is appropriate to consider abandonment of the water right).

The requirements of Montana’s change statute have been litigated and upheld in In re Application for Change of Appropriation of Water Rights for Royston, 249 Mont. 425, 816 P.2d 1054 (1991)(applicant for a change of appropriation has the burden of proof at all stages before the Department and courts, and the applicant failed to meet the burden of proving that the change would not adversely affect objectors’ rights; the application was properly denied because the evidence in the record did not sustain a conclusion of no adverse effect and because it could not be concluded from the record that the means of diversion and operation were adequate).

Prior to the enactment of the Water Use Act in 1973 and the promulgation of MCA § 85-2-402, the burden of proof in a change lawsuit was on the person claiming the change adversely affected their water right, although the law was the same in that an adverse effect to another appropriator was not allowed. Holmstrom Land Co., Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060 (1979), rehearing denied, 185 Mont. 409, 605 P.2d 1060 (1980), following Lokowich v. Helena, 46 Mont. 575, 129 P. 1063 (1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972)(appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive

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under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.

lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); Gassert v. Noyes, 18 Mont. 216, 44 P. 959 (1896)(after the defendant used his water right for placer mining purposes the water was turned into a gulch, whereupon the plaintiff appropriated it for irrigation purposes; the defendant then changed the place of use of his water right, resulting in the water no longer being returned to the gulch - such change in use was unlawful because it absolutely deprived the plaintiff of his subsequent right).

The DNRC in administrative rulings has held that a water right in a change proceeding is defined by actual beneficial use, not the amount claimed or even decreed. In the Matter of Application for Change Authorization No. G(W)028708-411 by Hedrich/Straugh/Ringer, December 13, 1991, Final Order ; In the Matter of Application for Change Authorization No. G(W)008323-g76L by Starkel/Koester, April 1, 1992, Final Order.

A key element of an evaluation of adverse effect to other appropriators is the determination of historic consumptive use of water. Consumptive use of water may not increase when an existing water right is changed. (In the Matter of Application to Change a Water Right No. 40M 30005660 By Harry Taylor II And Jacqueline R. Taylor, Final Order (2005); In The Matter of Application to Change a Water Right No. 40A 30005100 by Berg Ranch Co./Richard Berg, Proposal For Decision (2005) (Final Order adopted findings of fact and conclusions of law in proposal for decision); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, Proposal For Decision (2003) (Final Order adopted findings of fact and conclusions of law in proposal for decision).

In a change proceeding, the *consumptive* use of the historical right has to be determined:

In a reallocation [change] proceeding, both the actual historic consumptive use and the expected consumptive use resulting from the reallocation [change] are estimated. Engineers usually make these estimates.

With respect to a reallocation [change], the engineer conducts an investigation to determine the historic diversions and the historic consumptive use of the water subject to reallocation [change]. This investigation involves an examination of historic use over a period that may range from 10 years to several decades, depending on the value of the water right being reallocated [changed].

....

When reallocating [changing] an irrigation water right, the quantity and timing of historic consumptive use must be determined in light of the crops that were

irrigated, the relative priority of the right, and the amount of natural rainfall available to and consumed by the growing crop.

....

Expected consumptive use after a reallocation [change] may not exceed historic *consumptive* use if, as would typically be the case, other appropriators would be harmed. Accordingly, if an increase in consumptive use is expected, the quantity or flow of reallocated [changed] water is decreased so that actual historic consumptive use is not increased.

## 2 Water and Water Rights at § 14.04(c)(1).

The applicant in a change proceeding in Montana must prove the historic beneficial use of the water to be changed, no matter how recently the water right was decreed in Montana's adjudication. Although since Montana started its general statewide adjudication there is no Montana Supreme Court case on point to support the conclusion that even water rights as decreed in final decrees will be limited in change proceedings to their historical use, that conclusion is supported by the case of McDonald v. State, 220 Mont. 519, 722 P.2d 598 (1986). As a point of clarification, a claim filed for an existing water right in accordance with MCA § 85-2-221 constitutes *prima facie* proof of the claim only for the purposes of the adjudication pursuant to Title 85, Chapter 2, Part 2. The claim does not constitute *prima facie* evidence of historical use for the purposes of a change in appropriation proceeding before the Department under MCA § 85-2-402.

“Absent quantification of annual volume historically consumed, no protective condition limiting annual volume delivered can be placed on a Change Authorization, and without such a condition, the evidence of record will not sustain a conclusion of no adverse effect to prior . . . appropriators.” *In the Matter of the Application for Change of Appropriation water rights Nos. 101960-41S and 101967-41S by Keith and Alice Royston*, (1989) conclusion of law No. 8.

In the instant case, not only was there no quantification of the actual annual volume historically diverted or consumed for the individual rights, but the Applicant failed to identify all of the other water users potentially affected by this change application or analyze the effects to this proposed change on the water rights of existing water users. Given that the Cowett claim (41H-101024-00), the Kelly/Dryer claim (41H-101024-01) and the Rall claim (41H-30002020) are all appurtenant to the same 2.45 acres, two of those claims are quantified at a volume of 7 acre-feet (Cowett and Kelly/Dryer) and the Rall claim is unquantified, this Hearing Examiner cannot conclude from the record if the 7 acre feet amounts are to be additive or a single 7 acre



feet used total on the 2.45 acres for domestic use, and how the unquantified Rall right for the same acreage affects those numbers. This Hearing Examiner cannot conclude from the record that approval of this application will not result in an expansion of the water right(s). Applicant has failed to clear the evidentiary hurdle necessary for the Department to determine that the change application will not adversely affect the use of the existing water rights of other persons. Applicant has not proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected by the proposed change in appropriation right. (Finding of Fact Nos. 8, 9, 10, 11, 12, 13, 14, 15, 16)

#### **Means of Diversion**

5. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works is adequate. (Finding of Fact No. 17)

#### **Beneficial Use**

6. Applicant has not proven by a preponderance of the evidence that the proposed use of water is a beneficial use. While domestic and stockwatering are beneficial uses under MCA § 85-2-102(4), without some historic or proposed volumes, the Hearing Examiner cannot conclude that the amounts of water requested are the flows and amounts needed to sustain the proposed beneficial uses without waste. (Finding of Fact 18)

#### **Possessory Interest**

7. Applicant has proven by a preponderance of the evidence that they have a possessory interest in the property where the water is to be put to beneficial use. (Finding of Fact No. 19)

**WHEREFORE**, based upon the foregoing Findings of Fact and Conclusion of Law, the Hearing Examiner makes the following:

#### **FINAL ORDER**

Application to Change a Water Right No. 41H-30004451 by Constance Cowett is  
**DENIED.**

## **NOTICE**

A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under the Montana Administrative Procedure Act (Title 2, Chapter 4, MCA). A petition for judicial review under this chapter must be filed in the appropriate district court within 30 days after service of the final order. (MCA § 2-4-702)

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation of the written transcript. If no request for a written transcript is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

### **APPLICATION NO. 41H-2356200 (KELLY)**

## **Findings of Fact**

### **General**

1. Application to Change Water Right No. 41H-2356200 in the name of Charles and Amelia Kelly was filed with the Department on May 18, 2001. (Department File)
2. The application proposed to change the place of use of Statement of Claim No. 41H-023562-00 from the SESESE Sec. 7, T1S, R6E and NENENE Sec. 18, T1S, R6E to a new location within the same legal description (Kelly Property) and Statement of Claim No. 41H-033079 from the N2S2SW Sec. 7, T1S, R6E (Basile Subdivision) to the Kelly Property. (Department File, Exhibit R-6)
3. The Environmental Assessment (EA) prepared by the Department for this Change Application was reviewed and is included in the record of this proceeding. The EA concludes that there will be no significant impact on the environment if the change is approved. (Department File)
4. A public notice describing the facts pertinent to this Change Application was published in the *Bozeman Daily Chronicle*, a newspaper of general circulation, printed and published in Bozeman, Montana, on May 5, 2004 and was mailed to persons listed in the Department file on May 14, 2004. (Department File)
5. As a result of the Water Court decision in Case No. WC-96-2 the Applicant finds themselves the owners of 5 miner's inches (56.10 gpm) of the Martin V. Huffman decreed water right with a priority date of May 15, 1871. Those 5 miner's inches are

reflected in Statement of Claim No. 41H-023562-00 which is a domestic use claim with a period of use from January 1 to December 31. The Water Court established of volume of 7.00 acre feet for this claim appurtenant to 3 acres in the SESESE Sec. 7 and the NENENE Sec. 18, T1S, R6E. Applicant also finds themselves the owners of an additional 18.75 miner's inches (210.38 gpm) of the Martin V. Huffman decreed water right as reflected in Statement of Claim No. 41H-033079. Statement of Claim No. 41H-033079 is a stock claim with a period of use from January 1 to December 31 and also has a priority date of May 15, 1871. The Water Court did not establish a volume for this claim but stated "THIS WATER RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCKWATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE." (Order Modifying Memorandum Opinion Case No. WC-96-2)

6. Objections to the Application were received by the Department from Mark and Constance Cowett (Cowett), David and Cora Rall (Rall), and Clarice Dreyer and Steve Kelly (Department File)
7. Following considerable maneuvering by the parties, the Application was clarified and modified to reflect that only Statement of Claim No. 41H-033079 (stock claim) was proposed to be changed. Applicant has withdrawn that portion of the Application pertaining to Statement of Claim No. 41H-023562-00 (domestic claim). (Department file, Third Prehearing Order dated May 26, 2005)

### **Historic Use**

8. Water right Statement of Claim No. 41H-033079 (Kelly) is an adjudicated claim for stockwater based on the original Martin V. Huffman 50 miner's inch water right. This Statement of Claim is for 18.75 miner's inches (210.38 gpm) with a priority date of May 15, 1871. The place of use is described as the N2S2SW Sec. 7, T1S, R6E in Gallatin County. (OMMO, pp. 8)
9. The original Martin V. Huffman 50 miner's inch right was used historically and in similar fashion, along with the Jonathan Walker and James Walker 50 miner's inch rights, at all three original homesteads. Both Edwin Walker and Ken Walker testified in Water Court Case No. WC-96-2 that water was used to irrigate lawns, gardens and orchards around the homesteads. Water was also used for stock watering purposes. (MO at ¶ 8 – 12)

10. Of the 150 miner's inches originally decreed (Jonathan Walker, Martin V. Huffman, James Walker) there was, in most years, less than 150 miner's inches available and the water that was available was split between the three homesteads for the limited purposes of watering stock, and irrigating lawns, gardens and orchards. (MO at ¶ 10)
11. Water right Statement of Claim Nos. 41H-033079 (Kelly), 41H-018909 (under the name J & P Brown) and 41H-023561-00 (Rall) are all claims for stock watering purposes based on the Martin V. Huffman water right. The location of the Kelly claim appears to overlap a portion of the Rall claim while the location of the J & P Brown claim is separate. None of these claims specify a volume of water other than the statement "THIS WATER RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCKWATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON THE REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE." (Abstract of Claim Nos. 41H-033079-00, 41H-023561-00, MO @ ¶ 27)
12. There is nothing in the record to document the *actual* historic use (flow and volume) of these water rights nor is there any indication of the reasonable carrying capacity of the lands to which claims 41H-033079-00, 41H-023561-00, or 41H-018909-00 are appurtenant. In addition, there was no explanation of how these three rights were used historically so as to be able to understand the historical use of each right. The only evidence of stock water use was presented through the testimony of Edwin Walker and Ken Walker who testified in Water Court Case 96-2 that water was used year-round for stock watering. (MO at ¶ 8-12)

### **Adverse Effect**

13. Application No. 41H-2356200 does not identify the water rights which may be affected by the changes proposed (other than the rights of objectors to the Application). The Department does, however, identify the water rights on Middle Cottonwood Creek in the public notice portion of the Department's file. (Department file)
14. Applicant has not analyzed the effects of this change application on the use of the existing water rights of other persons. (Department file)
15. While it is clear that water was historically diverted under these water rights, no quantification of the historically diverted flow or volume was presented. In fact, when Edwin Walker was asked "[h]ow did you know how much water was diverted at the main

diversion up on the creek?” his reply was “We didn’t.” (Walker/Jordan testimony @ 51:21, OMMO).

16. It is also clear that water was historically used for stock watering, no quantification of the water used for that purpose was presented. The record is replete with references to stock watering in the area – using the James Walker, Jonathon Walker and Martin V. Huffman water rights – but when asked about the numbers of stock historically watered the record is at best vague. When asked about the number of horses they used to get their farming activities done, he replied “It would just be a wild guess. We’d have probably a dozen.” While all of the water diverted would be from the historically used point of diversion, there is no evaluation of how changing the places of use would affect return flows and potential downstream users. (Walker/Jordan testimony @ 18:19, Department file)

### **Means of Diversion**

17. Applicant proposes to utilize the existing ditch system which flows through the lands involved. This ditch system has been in place for many years and is adequate for the proposed uses. (Department file, testimony of Scott Compton, Exhibit K-1, Exhibit R-2, Exhibits RU-1 through RU-22)

### **Beneficial Use**

18. Applicant proposes to use water for stock watering purposes. This use is an identified beneficial use under MCA 85-2-102. Applicant estimates that they have 6 horses for stock watering purposes. No historic volumes used under these rights or estimated volumes for the proposed use are in the record. (Department file, testimony of Amelia Kelly)

### **Possessory Interest**

19. The Applicant has a possessory interest in the property where the water is to be put to beneficial use. (Department file, Exhibits C-1, C-2)

Based on the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

### **Conclusions of Law**

#### **General**

1. The Department has jurisdiction to approve a change in appropriation right if the appropriator proves the criteria in MCA § 85-2-402.
2. The Department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued; except for a lease authorization pursuant to MCA § 85-2-436, a temporary change authorization for instream use to benefit the fishery resource pursuant to MCA § 85-2-408, or water use pursuant to MCA § 85-2-439 when authorization does not require appropriation works, the proposed means of diversion, construction and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; except for a lease authorization pursuant to MCA § 85-2-436 or a temporary change authorization pursuant to MCA § 85-2-408 or MCA § 85-2-439 for instream flow to benefit the fishery resource, the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use; if the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant; and, if raised in a valid objection, the water quality of a prior appropriator will not be adversely affected; and the ability of a discharge permitholder to satisfy effluent limitations of a permit will not be adversely affected. MCA §§ 85-2-402(2)(a) through (g).
3. A public notice containing the facts pertinent to the change application must be published once in a newspaper of general circulation in the area of the source and mailed to certain individuals and entities. This requirement has been met MCA § 85-2-307. (Finding of Fact No. 4)

### **Adverse Effect**

4. In an application for a change in a water right, there must be some evidence of the actual historic use made of the water right. See *supra*, Conclusion of Law No. 4 Application No. 41H-30004451 by Cowett for a discussion of water rights change law.

In the instant case, not only was there no quantification of the actual annual volume historically diverted or consumed, but the Applicant failed to identify all of the other water users potentially affected by this change application or analyze the effects to this proposed change on the water rights of existing water users. This Hearing

Examiner cannot conclude from this record that approval of this application will not result in an expansion of the water right(s). Applicant has failed to clear the evidentiary hurdle necessary for the Department to determine that the change application will not adversely affect the use of the existing water rights of other persons. Applicant has not proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected by the proposed change in appropriation right. (Finding of Fact Nos. 8, 9, 10, 11, 12, 13, 14, 15, 16)

#### **Means of Diversion**

5. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works is adequate. (Finding of Fact No. 17)

#### **Beneficial Use**

6. Applicant has not proven by a preponderance of the evidence that the proposed use of water is a beneficial use. Stockwater is an identified beneficial use under MCA § 85-2-102. Without some historic or proposed volumes, the Hearing Examiner cannot conclude that the amounts of water requested are the amounts needed for beneficial use without waste. (Finding of Fact 18)

#### **Possessory Interest**

7. Applicant has proven by a preponderance of the evidence that they have a possessory interest in the property where the water is to be put to beneficial use. (Finding of Fact No. 19)

**WHEREFORE**, based upon the foregoing Findings of Fact and Conclusion of Law, the Hearing Examiner makes the following:

#### **FINAL ORDER**

Application to Change a Water Right No. 41H-2356200 by Charles and Amelia Kelley is **DENIED**.

#### **NOTICE**

A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under the Montana Administrative Procedure Act (Title 2, Chapter 4, MCA). A petition for judicial review under this chapter must be filed in the appropriate district court within 30 days after service of the final order. (MCA § 2-4-702)

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation of the written transcript. If no request for a written transcript is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.



**APPLICATION NO. 41H-30018777 (RALL)**

**Findings of Fact**

**General**

1. Application to Change Water Right No. 41H-30018777 in the name of David and Cora Rall was filed with the Department on May 3, 2005. (Department File)
2. The application proposed to change the place of use of Statement of Claim No. 41H-023559-00 from the SESESE Section 7, and the NENENE Sec.18, T1S, R6E to the SENWSE Sec. 8 (Rall Property); Statement of Claim No. 41H-023561-00 from S2SE Sec. 7, and the E2SESW Sec. 7, T1S, R6E to the Rall Property; and Statement of Claim No. 41H-30002020 from the NWSWSW Sec. 8, T1S, R6E to the Rall Property. The application also proposes to change the purpose of use for all three claims to fish and wildlife, recreation and fire protection utilizing a new pond with a storage capacity of approximately 6.1 acre feet located at the proposed new place of use. (Department File)
3. The Environmental Assessment (EA) prepared by the Department for this Change Application was reviewed and is included in the record of this proceeding. The EA concludes that there will be no significant impact on the environment if the change is approved. (Department File)
4. A public notice describing the facts pertinent to this Change Application was published in the *Bozeman Daily Chronicle*, a newspaper of general circulation, printed and published in Bozeman, Montana, on March 30, 2006, and was mailed to persons listed in the Department file on March 27, 2006. (Department File)
5. As a result of the Water Court decision in Case No. WC-96-2 the Applicant finds themselves the owners of 20.0 miner's inches (224.4 gpm) of the Martin V. Huffman decreed water right with a priority date of May 15, 1871. Those 20.0 miner's inches are reflected in Statement of Claim Nos. 41H-023559-00 and 41H-023561-00. Statement of Claim No. 41H-023559-00 is an irrigation use claim with a period of use from May 1 to September 30. The Water Court did not specify a volume for this claim but did establish a maximum acreage of 2.00 acres in the SESESE Sec. 7, and the NENENE Sec. 8 T1S, R6E. Statement of Claim No. 41H-023561-00 is a stock claim with a period of use from January 1 to December 31. The Water Court did not establish a volume for this claim but stated "THIS WATER RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCKWATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON

REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.” The Water Court found that Statement of Claim No. 41H-023561-00 was appurtenant to the S2SE and the E2SESW Sec. 7, T1S, R6E. These two Statements of Claim are for the same 20.0 miner’s inches of water and thus are multiple use claims. In other words, the use of these claims for several purposes does not increase the extent of the right(s) but rather allows the owner to alternate and exchange the use of the water.

6. Applicant also finds themselves the owner of 22.50 miner’s inches (252.45 gpm) James Walker decreed water right with a priority date of May 15, 1871. Those 22.5 miner’s inches are reflected in Statement of Claim No. 41H-30002020. Statement of Claim No. 41H-30002020 is an irrigation use right with a period of use from May 1 to September 30. The Water Court did not specify a volume for this claim other than the notation “THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE” but did establish a maximum acreage of 2.45 acres in the NWSWSW Sec. 8, T1S, R6E. Statement of Claim No. 41H-30002020 is a multiple use right with Claim No. 41H-15513-00. (Order Modifying Memorandum Opinion Case No. WC-96-2, General Abstract Nos. 41H-023559-00, 41H-023561-00 and 41H-30002020)
7. Objections to the Application were received by the Department from Charles and Amelia Kelly (Kelly), Steve Kelly and Clarice Dreyer (Kelly/Dreyer), and John and Patricia Brown. (Department File)

### **Historic Use**

8. Water right Statement of Claim Nos. 41H-023559-00 and 41H-023561-00 are both adjudicated claims for irrigation multiple use with stockwater as a multiple use on lands to which Statement of Claim No. 41H-023562-00 (Kelly) is also appurtenant. In addition, Statement of Claim No. 41H-30002020 is an adjudicated claim for irrigation use (as a multiple use) on the same 2.45 acres of land to which Statement of Claim Nos. 41H-101024-00 (Cowett) and 41H-101024-01 (Dreyer/Kelly) are also appurtenant. (OMMO)
9. The original James Walker 50 miner’s inch right and the Martin V. Huffman 50 miner’s inch water right, along with the original Jonathan Walker 50 miner’s inch water right, were used in a similar fashion at all three original homesteads. Both Edwin Walker and Ken Walker testified in Water Court Case No. WC-96-2 that water was used to irrigate lawns, gardens and orchards around the homesteads. (MO at ¶ 8 – 12)

10. Of the 150 miner's inches originally decreed (Jonathan Walker, Martin V. Huffman, James Walker) there was, in most years, less than 150 miner's inches available and the water that was available was split between the three homesteads for the limited purposes of watering stock, and irrigating lawns, gardens and orchards. (MO at ¶ 10)
11. There is no evidence in the record of the *actual* amounts of water diverted or used for domestic, irrigation, or stockwater purposes under Statement of Claim Nos. 41H-023559-00, 41H-023561-00, 41H-30002020, 41H-023562-00, 41H-101024-00 or 41H-101024-01. Nor is there any explanation of how these rights were used historically so as to be able to understand the historical use of each right. (Department File, Hearing Record)

### **Adverse Effect**

12. Application No. 41H-30018777 does not identify the water rights which may be affected by the changes proposed (other than the rights of objectors to the Application). The Department does, however, identify the water rights on Middle Cottonwood Creek in the public notice portion of the Department's file. (Department file)
13. Applicant has not analyzed the effects of this change application on the use of the existing water rights of other persons. (Department file)
14. While it is clear that water was historically diverted under these water rights, no quantification of the historically diverted flow and volume was presented. In fact, when Edwin Walker was asked "[h]ow did you know how much water was diverted at the main diversion up on the creek?" his reply was "We didn't." (Walker/Jordan testimony @ 51:21, Department file).
15. It is also clear that water was historically used for stock watering, no quantification of the water used for that purpose was presented. The record is replete with references to stock watering in the area – using the James Walker, Jonathon Walker and Martin V. Huffman water rights – but when asked about the numbers of stock historically watered the record is at best vague. For example, when asked about the number of horses they used to get their farming activities done, he replied "It would just be a wild guess. We'd have probably a dozen." (Walker/Jordan testimony @ 18:19, OMMO, Department file)
16. Applicant conjectures that the original use of Statement of Claim No. 41H-023559-00 was used in conjunction with a flood irrigation system. Assuming that the two acres listed in the right were used to fully irrigate alfalfa and using the Montana irrigation manual, 7.4 acre feet would be the volume applied to these two acres. Applicant then calculates that "because the Ralls have 80% of the irrigation flow originally set forth in

conjunction with this right, they seek to change 5.92 acre feet of water in conjunction with this claim. Applicant conducts a similar analysis for Statement of Claim 41H-30002020. (Department file)

17. There is no information in the record that proves that the two acres of irrigation contemplated under Statement of Claim No. 41H-023559-00 was fully irrigated alfalfa. The record shows that the 20.0 miner's inches now owned by the Ralls was an irrigation multiple use claim with stockwater as a multiple use. There is no evidence of what proportion of water was dedicated to any or each of the particular uses. (Department file, MO, OMMO)

### **Means of Diversion**

18. Applicant proposes to utilize the existing ditch system which flows through the lands involved. This ditch system has been in place for many years and is adequate for the proposed uses. (Department file, testimony of Scott Compton, Exhibit R-2, Exhibits RU-1 through RU-22)

### **Beneficial Use**

19. Applicant proposes to use water for fish, wildlife and recreation . These uses are identified beneficial uses under MCA § 85-2-102. Applicant provides credible information that the flow through the pond should be at least 70 gpm, or greater for the benefit of fisheries. Applicant has not provided evidence that the volume requested for the proposed pond is the amount necessary for fish, wildlife and recreation purposes. (Department file letter from Drake Associates to Jan Mack, testimony of Mark Cowett, )

### **Possessory Interest**

20. The Applicant has a possessory interest in the property where the water is to be put to beneficial use. (Department file)

### **Water Quality**

21. The Application received two water quality objections. Those objections were based on increased temperature, excessive algae growth, "fixed sediments," and toxic chemical releases from the Rall pond. Objectors brought no evidence (or definition) of "fixed sediments" and presented no evidence on toxic chemicals. (Department file)
22. Objector Kelly introduced evidence of algae growth in the Davis Ditch, in the vicinity of the Rall pond outlet works, and around the Kelly pond. Objector Kelly asserts that this algae growth is a result of the Rall pond, or at least is exacerbated by the Rall pond. (Exhibits K-8 through K-11, K-13 through K-17)

23. Applicant introduced evidence and expert testimony regarding the effects of the Rall pond on temperature and water quality in Davis Ditch. That evidence and testimony reveals that the Rall pond has no effect on nutrient levels and a small effect on temperature (increase) in Davis Ditch. The analysis supports a finding that the Rall pond will not increase algae levels in the Davis Ditch. (Exhibit RH-1, testimony of Dan Hoffman)

Based on the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

### **Conclusions of Law**

#### **General**

1. The Department has jurisdiction to approve a change in appropriation right if the appropriator proves the criteria in MCA § 85-2-402.
2. The Department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued; except for a lease authorization pursuant to MCA § 85-2-436, a temporary change authorization for instream use to benefit the fishery resource pursuant to MCA § 85-2-408, or water use pursuant to MCA § 85-2-439 when authorization does not require appropriation works, the proposed means of diversion, construction and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; except for a lease authorization pursuant to MCA § 85-2-436 or a temporary change authorization pursuant to MCA § 85-2-408 or MCA § 85-2-439 for instream flow to benefit the fishery resource, the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use; if the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant; and, if raised in a valid objection, the water quality of a prior appropriator will not be adversely affected; and the ability of a discharge permit holder to satisfy effluent limitations of a permit will not be adversely affected. MCA §§ 85-2-402(2)(a) through (g).
3. A public notice containing the facts pertinent to the change application must be published once in a newspaper of general circulation in the area of the source and

mailed to certain individuals and entities. This requirement has been met MCA § 85-2-307. (Finding of Fact No. 4)

#### **Adverse Effect**

4. In an application for a change in a water right, there must be some evidence of the actual historic use made of the water right. See *supra*, Conclusion of Law No. 4 Application No. 41H-30004451 by Cowett for a discussion of water rights change law.

In the instant case, not only was there no quantification of the actual annual volume historically diverted or consumed under the individual rights, but the Applicant failed to identify all of the other water users potentially affected by this change application or analyze the effects to this proposed change on the water rights of existing water users. This Hearing Examiner cannot conclude from this record that approval of this application will not result in an expansion of the water right(s). Applicant has failed to clear the evidentiary hurdle necessary for the Department to determine that the change application will not adversely affect the use of the existing water rights of other persons. Applicant has not proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected by the proposed change in appropriation rights. (Finding of Fact Nos. 7, 8, 9, 10, 11, 12, 13, 14, 15, 16)

#### **Means of Diversion**

5. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works is adequate. (Finding of Fact No. 17)

#### **Beneficial Use**

6. Applicant has not proven by a preponderance of the evidence that the proposed use of water is a beneficial use. Fish, wildlife, and recreation are beneficial uses under MCA § 85-2-102(4). Without some historic or proposed volumes, the Hearing Examiner cannot conclude that the amounts of water requested are the flow and amounts needed to sustain the beneficial uses without waste. (Finding of Fact 18)

#### **Possessory Interest**

7. Applicant has proven by a preponderance of the evidence that they have a possessory interest in the property where the water is to be put to beneficial use. (Finding of Fact No. 19)

**Water Quality**

8. Applicant has proven by a preponderance of the evidence that the water quality of an appropriator will not be adversely affected. (Finding of Fact Nos. 20, 21, 22)

**WHEREFORE**, based upon the foregoing Findings of Fact and Conclusion of Law, the Hearing Examiner makes the following:

**FINAL ORDER**

Application to Change a Water Right No. 41H-30018777 by David and Cora Rall is **DENIED**.

**NOTICE**

A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under the Montana Administrative Procedure Act (Title 2, Chapter 4, MCA). A petition for judicial review under this chapter must be filed in the appropriate district court within 30 days after service of the final order. (MCA § 2-4-702)

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation of the written transcript. If no request for a written transcript is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

DATED this 5<sup>th</sup> day of August 2008.

/Original signed by David A Vogler/

David A. Vogler, Hearing Examiner  
Department of Natural Resources  
and Conservation  
Water Resources Division  
P.O. Box 201601  
Helena, Montana 59620-1601

### **CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 5<sup>th</sup> day of August, 2008 by first class United States mail.

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/Original signed by Jamie Price/  
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